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Police Interrogation and the Right to Counsel, Post *Escobedo v. Illinois*: Application v. Emasculation

By HENRY B. ROTHBLATT*

The right to use counsel at the formal trial, [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.[1]

IN 1960, the writer of this article explored the question of police interrogation: the right to counsel and to prompt arraignment.[2] This was four years prior to *Escobedo v. Illinois*.[3] In what follows, we explore the decisions subsequent to *Escobedo*. The area of exploration will cover those avenues of pretrial examination which, as a result of *Escobedo*, have become one-way streets in favor of the defendant.

Danny Escobedo was arrested without a warrant at 2:30 A.M. on January 20, 1960, for the murder of his brother-in-law, which occurred on the evening of January 19. He was questioned, made no statements, and was released at 5 P.M. on a writ of habeas corpus.

On January 30, 1960, a codefendant told the police that Escobedo had fired the fatal shots. Escobedo was arrested between 8 and 9 P.M. that same evening. During the ride to the station, police officers told the defendant that they had a strong case and that he should confess. The defendant stated he wanted the advice of his lawyer.

Defendant's lawyer arrived at the police station between 9:30 and 10:00 P.M. and requested permission to see his client. The desk officer, as well as several other policemen, told the lawyer he could not see the accused. At 1:00 A.M., the lawyer was still unsuccessfully seeking access to his client. During this entire period Escobedo was being subjected to interrogation. In response to his repeated requests for

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[1] Escobedo v. Illinois, 378 U.S. 478, 487 (1964).

[2] Rothblatt and Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 23 (1960).

[3] 378 U.S. 478 (1964).

permission to confer with his attorney, he was informed that the lawyer did not wish to see him. Escobedo claimed that a police officer, Officer Montejano, who knew him and his family, spoke to him alone and told him he would try to get him released if he made a statement implicating the codefendant, DiGerlando.

Later, when Escobedo was confronted with DiGerlando, he said to him: "I didn't shoot Manuel, you did it."[4] Self-inculpatory oral statements followed and an experienced assistant State's Attorney was called in to take a written statement. This attorney acknowledged that he had not advised Escobedo of his right to counsel and to remain silent, nor was it denied that no person during the interrogation had so advised him.

The United States Supreme Court held that Escobedo had been deprived of his constitutional right to counsel. It rested its conclusion on five relevant factors:

> [1] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, [2] the suspect has been taken into police custody, [3] the police carry out a process of interrogations that lends itself to eliciting incriminating statements, [4] the suspect has requested and been denied an opportunity to consult with his lawyer, [5] and the police have not effectively warned him of his absolute constitutional right to remain silent . . . .[5] (Numbers in brackets supplied.)

The questioning of Escobedo was conducted prior to his formal indictment. But the Court held that under the circumstances of the case, this fact was irrelevant. It added that after his request to confer with counsel and the denial of that request by the police, "the investigation had ceased to be a general investigation of an 'unresolved crime.' Escobedo had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."[6]

The Court pointed out the "direct relationship between the importance of a stage [the period of interrogation] to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice."[7] It is at this critical stage that the "guiding hand of counsel"[8] is most essential if the constitutional guarantee

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[4] *Id.* at 483.
[5] *Id.* at 490-91.
[6] *Id.* at 485.
[7] *Id.* at 488.
[8] Powell v. Alabama, 287 U.S. 45, 69 (1932).

of counsel is to be something more than a meaningless and bootless right.

By abandoning its former rule that only post-indictment interrogation would be challenged[9] and holding that pre-indictment interrogation could also be attacked, where police activity shifts from the investigatory to the accusatory stage in "focusing" on an individual, the Court has established a new locus for a fundamental constitutional right.[10]

As Mr. Justice White in his dissenting opinion correctly points out,

> it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel[11] . . . or has asked to consult with counsel in the course of interrogation. . . .[12] *At the very least* the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.[13]

What Mr. Justice White characterized as the Court's "invitation to go farther"[14] has been accepted by the Supreme Court of California in the well-reasoned opinion of *People v. Dorado*.[15] A prisoner in a state penitentiary was found stabbed to death, the character of the wounds indicating that they were inflicted by a small knife. In a trash can in a nearby bathroom the prison officials found a bloodstained jacket with the name "Dorado" printed on the pocket and a button missing. In the same trash can was a sharp knife with a taped handle. The missing button was found at the scene of the crime. The defendant was found in his cell clad in his underwear. A subsequent search of the cell turned up bloodstained trousers and tape similar to that found on the knife. Dorado was then taken to a prison office where he was told of the murder. He was subjected to a blood test to determine if brown stains on his hand were the blood of the murdered prisoner. Upon his return, a two-hour interrogation took place, following which he confessed.

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[9] Massiah v. United States, 377 U.S. 201 (1964).

[10] *Cf.* Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

[11] *Cf.* Gideon v. Wainwright, *supra* note 10; Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1955).

[12] "[R]equesting counsel" is a "formality" upon which the defendant's "right may not be made to depend." Carnley v. Cochran, 369 U.S. 506, 513 (1962).

[13] Escobedo v. Illinois, 378 U.S. 478, 495 (1964). (Emphasis added.)

[14] *Id.* at 496.

[15] 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), *cert. denied*, 381 U.S. 937 (1965).

The California court considered the five relevant factors of *Escobedo* and found: (1) The investigation had reached the critical accusatory stage and begun to "focus" on Dorado; (2) he was already in police custody; (3) the interrogation was for the purpose of securing inculpatory statements from the accused; (5) Dorado had not been warned of his right to remain silent and his right to counsel. However, the accused had failed to request counsel, so that the "request and denial" (4) factor of *Escobedo* was lacking. It thus appears that Mr. Justice White had unwittingly facilitated the acceptance of "the invitation." For in writing that it would make no difference if the accused retained or *even requested* counsel,[16] he opened the very floodgates which he so vigorously fought to keep closed.

[16] Escobedo v. Illinois, 378 U.S. 478, 495 (1964). The California court in *Dorado* uses Mr. Justice White's statement to justify its interpretation of *Escobedo*. 62 Cal. 2d 338, 350, 42 Cal. Rptr. 169, 177, 398 P.2d 361, 369 (1965). See also Miller v. Warden, Maryland State Penitentiary, 338 F.2d 201, 204 (4th Cir. 1964); Wright v. Dickson, 336 F.2d 878, 882 (9th Cir. 1964); People v. Dorado, *supra* at 362, 42 Cal. Rptr. at 178, 398 P.2d at 370; State v. Neely, 395 P.2d 557, 560 (Ore. 1964).

The majority of the appellate courts throughout the country have rejected the *Dorado* reasoning and have attempted to confine *Escobedo* to its facts. In Browne v. State, 24 Wis. 2d 491, 131 N.W.2d 169 (1964) wherein no request was made, the Wisconsin court wrote: "The most that Escobedo holds . . . is that the failure to inform a criminal suspect under arrest [of his constitutional right to remain silent] when coupled with other circumstances, may be sufficient to require exclusion of any admission by him. We find here a total lack of any other circumstances which require exclusion of the instant admissions." *Id.* at 511g, 131 N.W.2d at 171. *Accord,* Cephus v. United States, 33 U.S.L. WEEK 2674 (D.C. Cir. June 21, 1965); United States, *ex rel.* Townsend v. Ogilvie, 339 F.2d 837, 843 (7th Cir. 1964); State v. Fox, 131 N.W.2d 684 (Iowa, 1965); Bean v. State, 398 P.2d 251 (Nev. 1965); State v. Scanlon, 84 N.J. Super. 427, 202 A.2d 448 (1964); People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965).

In *Dorado* the court found that a specific request on the part of the defendant was an artificial requirement; the test must be a substantive one whether or not the point of necessary protection had been reached. People v. Dorado, *supra* at 361, 42 Cal. Rptr. at 176, 398 P.2d at 368. *Accord,* United States *ex rel.* Rivers v. Myers, 240 F. Supp. 39 (E.D. Pa. 1965); United States *ex rel.* Russo v. New Jersey, 33 U.S.L. WEEK 2621, (3d Cir. May 20th, 1965), *cert. denied,* 33 U.S.L. WEEK 3389 (1965); State v. Mendes, 210 A.2d 50 (R.I. 1965).

On July 12th more fuel was thrown into the fire of controversy when the New Jersey Supreme Court flatly refused to follow the Third Circuit's holding in *Russo.* State v. Ordoz [Rush], N.Y. Times, July 29th, 1965, p.1, col. 1 (city ed.). The New Jersey court upheld its own Chief Justice Weintraub who, some two weeks after *Russo* was decided, sent a letter to all New Jersey judges directing them to ignore the Third Circuit's ruling.

Once the investigation has begun to focus on the accused, he must be informed of his right to remain silent. State v. Neely, 395 P.2d 557 (Ore. 1965); see also Altson v. United States, 348 F.2d 72 (D.C. Cir. 1965); see generally Note, 19 RUTGERS L. REV. 111 (1964). For a discussion on how the trial lawyer presents the "failure to inform" to the jury and sample requests to charge, see ROTHBLATT, SUCCESSFUL TECHNIQUES IN THE TRIAL OF CRIMINAL CASES 140-41, 211-15 (1961).

In *Dorado*, the California court rejected the narrow and formalistic reading of *Escobedo*, reasoning that if a demand for counsel was a requirement, this would discriminate against an accused who did not know about his right to counsel. The court wrote:

> The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it.[17]

The dissenting opinion of Justice McComb makes the point that the suspect in *Dorado* neither requested nor was denied an opportunity to confer with counsel. "Under the precise and limiting language . . . in the *Escobedo* case," he said, "it is clear that the facts in the instant case are different, and that the *Escobedo* case is not applicable."[18]

Justice Burke, who also dissented, agreed with the majority that as a practical matter the right to counsel should not depend upon a request. However, Justice Burke pointed out that the accused had been convicted of a previous offense and it was presumed that he had been informed at prior arraignments and trials of his right to have counsel. He then contrasted the degrees of criminal sophistication of Danny Escobedo and Robert Dorado, concluding that the circumstances of the two cases render the *Escobedo* decision inapplicable to the *Dorado* case. He stated that "the crucial test at the accusatory stage is whether we may reasonably infer from the circumstances . . . of the particular case that the accused was aware of his constitutional rights."[19]

If, as Justice Burke suggests, we are to presume that because of previous convictions, Robert Dorado knew of his right to have counsel at the prearraignment stage, some three years before the Supreme Court of the United States decided *Escobedo*,[20] it "would be to ascribe to him an utterly fictitious clairvoyance."[21]

Justice Burke interprets the *Escobedo* test as the "sum total of the circumstances" resulting in a fundamental prejudice to the ac-

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[17] People v. Dorado, *supra* note 16, at 351, 42 Cal. Rptr. at 177-78, 398 P.2d at 369-70.

[18] *Id.* at 362, 42 Cal. Rptr. at 185, 398 P.2d at 377.

[19] *Id.* at 366, 42 Cal. Rptr. at 187, 398 P.2d at 379; See State v. Vigliano, 43 N.J. 44, 202 A.2d 657 (1964).

[20] The homicide in Dorado took place in 1961.

[21] People v. Stewart, 62 Cal. 2d 571, 581, 43 Cal. Rptr. 201, 207, 400 P.2d 97, 103 (1965).

cused.[22] This interpretation is based on *Crooker v. California*,[23] where a thirty-one year old college graduate, who had completed the first year of law school and had studied criminal law, confessed to murder. During his interrogation, the defendant had requested and was denied an opportunity to consult with counsel. He refused to submit to a lie detector test and answered a number of questions in a very "professional" manner. He indicated an awareness of his right to remain silent, and no coercive tactics were used. In an opinion by Mr. Justice Clark, the Court found that the sum total of the circumstances of this case did not vouchsafe to Crooker the right to counsel at interrogation. The Court added that the due process right to counsel is violated if the defendant "is so prejudiced thereby as to infect his subsequent trial with an absence of the fundamental fairness essential to the very concept of justice."[24] Mr. Justice Douglas writing for a four-man minority rejected the "sum total of the circumstance" test and quoted from *Glaser v. United States*[25] to support his position: "The right to have counsel is too fundamental and absolute to allow courts to indulge in mere calculations as to the amount of prejudice resulting in its denial."[26]

In *Escobedo*, Mr. Justice Goldberg added his vote to the four dissenters of *Crooker* to make the minority a majority. After discussing and distinguishing the facts of *Crooker*, he wrote: "In any event, to the extent that . . . Crooker may be inconsistent with the principle announced today, [it is] not to be regarded as controlling."[27] This statement, together with the dissenting opinion in *Crooker*, so dilutes *Crooker* and the "sum total" test that the *Crooker* decision must be strictly confined to the facts of the case.[28]

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[22] People v. Dorado, 62 Cal. 2d 338, 367, 42 Cal. Rptr. 169, 188, 398 P.2d 361, 380 (1965).

[23] 357 U.S. 433 (1958).

[24] *Id.* at 439. The "fundamental fairness" test was rejected in Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). Of this rejection the Second Circuit wrote, "it was precisely this sort of elusive and unsatisfactory inquiry into the possibility of prejudice which Gideon sought to inter once and for all. . . . [A] criminal defendant compelled to act without the advice of counsel will always be disadvantaged thereby, and . . . the precise degree of that disadvantage can never be satisfactorily measured by an after-the-fact search for prejudice." United States *ex rel.* DuRocher v. LaVellee, 330 F.2d 303, 308 (2d Cir. 1964).

[25] 315 U.S. 60 (1942).

[26] *Id.* at 76.

[27] Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

[28] Several courts consider the "totality of the circumstances" test still applicable and have atttempted to distinguish their decisions from *Escobedo*. In Mefford v. State, 235 Md. 497, 201 A.2d 824 (1964), the accused never asked for a lawyer, there was no prolonged detention, he voluntarily offered the statement, and his request to see

In *Escobedo*, Mr. Justice Goldberg wrote that the right to counsel matures "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession . . . ."[29] Once again we return to a California decision to examine the application of this holding. In *People v. Stewart*,[30] the police were investigating a series of "purse snatch" assaults, one of which resulted in the death of the victim. A check taken in one of the robberies was cashed and Stewart identified as the endorser. A police officer went to the defendant's residence and placed him under arrest. The officer requested permission to search the house and was given the "go ahead." After the search an interrogation took place. Stewart, without being informed of his rights, made several self-incriminating statements. At a subsequent interrogation he confessed to the felony-murder robbery.

The Supreme Court of California reversed the conviction and, in the course of its opinion, discussed the accusatory stage of interrogation at length. The arrest encompassed the "focus"[31] and "police custody"[32] factors of *Escobedo*. However, the court reasoned that the

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his wife was granted. Mefford was also informed of his privilege to remain silent, and thus, reasoned the court, the police had given the defendant the same advice he would have received from his lawyer.

In Van Moltke v. Gillies, 332 U.S. 708 (1948), Mr. Justice Black discussed at length the advice of government officials. "The constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." *Id.* at 725-26.

In Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964), although the defendant was not informed of his right to counsel, the confession which he was requested to sign contained a statement that he need not sign and could remain mute. See also People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964), *cert. denied*, 85 Sup. Ct. 1104 (1965); Commonwealth v. Coyle, 415 Pa. 379, 203 A.2d 783 (1964); Browne v. State, 24 Wis. 2d 491, 131 N.W.2d 169 (1965) *cert. denied*, 85 Sup. Ct. 1094 (1965).

It has been expressed that *Crooker* has been "buried" by *Escobedo* and the recent Court decisions. Lee v. United States, 322 F.2d 770 (5th Cir. 1963); See generally Norenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 54 B.U.L. REV. 430 (1964); Sutherland, *A Forum on the Interrogation of the Accused*, 49 CORNELL L.Q. 377, 416-17 (1964); Shadoan, *New Developments in Confession Suppression*, 31 J.D.C.B.A. 502 (1964); Note, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 220 (1964); Note, 53 CALIF. L. REV. 337 (1965).

[29] Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

[30] 62 Cal. 2d 571, 43 Cal. Rptr. 201, 400 P.2d 97 (1965).

[31] An arrest in California either with or without a warrant must be founded on probable cause. CAL. PEN. CODE §§ 813, 836.

[32] By definition, an arrest includes the taking of a person into custody. CAL. PEN. CODE § 834.

"critical"[33] stage is not reached unless another condition precedent is met: the police must "carry out a process of interrogations that lends itself to eliciting incriminating statements . . . ."[34]

In *United States v. Konigsberg*,[35] several persons were arrested in a garage containing stolen men's suits and were removed to a local Federal Bureau of Investigation office. At the office prior to arraignment, Konigsberg was asked "why he was in the garage and what had taken place . . . and . . . if he wished to *cleanse* himself or explain . . . what his reasons for being there were."[36]

The Third Circuit found that the process was investigative and had not shifted to the accusatory stage. Its purpose was not to elicit a confession, but rather to give Konigsberg an opportunity to explain his presence in the garage. "Focus was not centered on Konigsberg, there was a general inquiry . . . concerning the unsolved hijacking . . . ."[37] The F.B.I. agent testified that the questions were put to Konigsberg in a conversational manner and the Third Circuit distinguished the "conversational" tone in *Konigsberg* from the "aggressive interrogation" of *Escobedo*.

This is a false and unduly restrictive distinction. The manner in which the questions are asked is irrelevant. The true test is whether the purpose of the questioning is to encourage the accused to make an incriminating statement "despite his constitutional right not to do so."[38] The arrest is usually followed by some form of interrogation and one would be naive to believe that the use of the word "cleanse" changes this purpose.

In order to determine if the police are carrying out a "process of interrogations that lends itself to eliciting incriminatory statements,"[39] the California Supreme Court proposes to "analyze the total situation which envelopes the questioning by considering such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other

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[33] Chief Judge Anderson of the United States District Court of Connecticut defines the critical stage thus: at the time "an accused is arrested on a particular charge." *Panel: Representation of Defendants*, 36 F.R.D. 129, 141 (1964). See also Enker and Elsen, *Counsel for the Suspect: Massiah v. United States, Escobedo v. Illinois*, 49 MINN. L. REV. 47, 71-73 (1964); Rothblatt and Rothblatt, *supra* note 2, at 32.

[34] Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[35] 336 F.2d 844 (3d Cir. 1964).

[36] *Id.* at 852. (Emphasis added.)

[37] *Id.* at 853.

[38] Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

[39] *Id.* at 491.

relevant circumstances."[40] The actual intent or subjective purpose of the police is unimportant, and the test, if one is necessary, must be based on an objective consideration of the circumstances.[41]

In most cases the "critical stage" will be reached immediately upon the arrest of the accused. The fourth amendment, which is made obligatory upon the states through the fourteenth[42] mandates that an arrest be based on probable cause.[43] The investigation may continue, but nevertheless, an individual has been placed in the "spotlight." The arrested individual becomes a prime suspect and our "adversary system begins to operate."[44] Nothing prohibits the police from getting "information from witnesses,"[45] but by their own choice they have brought about the crystallization of the "critical stage." It is at this point that the prime suspect must be informed of his constitutional right to counsel and to remain silent.

Are there any circumstances which might excuse the police from informing a "prime suspect" of his constitutional rights? In a recent case,[46] the police were searching for a missing infant after finding her sister beaten to death. The prime suspect was approached by an officer and investigator from the District Attorney's office. They suggested to the suspect that the girl might still be alive and her life could be saved. The defendant then blurted out words which led to the discovery of the body. The court engaged in a balancing act and came up with this conclusion:

> The paramount interest in saving her life, if possible, clearly justified the officers in not impeding their rescue efforts by informing defendant of his rights . . . . [The] investigatory and rescue operations were . . . inextricably interwoven . . . and it would be needlessly restrictive to exclude any evidence lawfully obtained during the rescue operations.[47]

Although this case turns on a unique and compelling set of facts, the better conclusion would have resulted in suppression of the state-

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[40] People v. Stewart, 62 Cal. 2d 571, 579, 43 Cal. Rptr. 201, 206, 400 P.2d 97, 103 (1965).

[41] People v. Stewart, *supra* note 40; Enker and Elsen, *supra* note 33, at 71.

[42] Wolf v. Colorado, 338 U.S. 25 (1949). See also Mapp v. Ohio, 367 U.S. 643 (1961).

[43] Wong Sun v. United States, 371 U.S. 471 (1961); Draper v. United States, 358 U.S. 307 (1959).

[44] Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

[45] *Ibid.*

[46] People v. Modesto, 62 Cal. 2d 436, 42 Cal. Rptr. 417, 398 P.2d 753 (1965).

[47] Id. at 446, 42 Cal. Rptr. at 423, 398 P.2d at 759.

ments. The good faith of police officers does not justify the denial of a constitutional right.[48]

From the preceding discussion, it appears that one need not be arrested to come within the protective scope of *Escobedo*. In *Biddle v. Commonwealth*,[49] the police were called in to investigate the death of a baby. The infant's body was sent to the medical examiner for an autopsy. At 9:30 in the evening, two detectives, armed with the medical examiner's report, requested that the mother and father accompany them to police headquarters. At headquarters the parents were informed that the child's death resulted from malnutrition and dehydration. The mother was questioned about the feeding schedule of the baby and replied that it was normal. The husband was then removed from the room and the wife left alone. When the detective returned she was in tears. He asked her if "she wanted to tell him the truth about how she fed the baby."[50] Mrs. Biddle then proceeded to make self-inculpatory statements.

The Virginia court refused to exclude the statements, holding that the police were merely investigating whether a crime had been committed and that the investigatory stage of the process had not yet concluded. The death of the baby was caused by malnutrition and dehydration, causes which logically result from parental neglect. The question posed to the mother clearly indicated that the spotlight had focused on her and that the interrogation had as its sole purpose the extraction of self-incriminatory statements.

One further example of the misapplication of the "critical stage" concept is necessary to drive the point home. An accused was being interrogated by the Massachusetts police in connection with a robbery. During the course of the interrogation he made some self-incriminating statements concerning a murder in Philadelphia.[51] The Supreme Court of Pennsylvania admitted these statements, holding that "the . . . killing was . . . not the main focal point of the interrogation but merely a corollary thereof. It was, therefore, not such a 'critical stage' in the proceedings . . . that the absence of counsel would vitiate any damaging admissions as to the present issue."[52]

The so-called "precise and limiting"[53] language of *Escobedo* in-

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[48] Director General v. Kastenbaum, 263 U.S. 25, 28 (1923).

[49] 141 S.E.2d 710 (Va. 1965).

[50] *Id.* at 711.

[51] Commonwealth v. Coyle, 415 Pa. 379, 203 A.2d 783 (1964).

[52] *Id.* at 403, 203 A.2d at 794-95.

[53] People v. Dorado, 62 Cal. 2d 338, 362, 42 Cal. Rptr. 169, 185, 398 P.2d 361, 377 (1965) (McComb, J., dissenting).

cludes the following: "*no* statement elicited by the police may be used against him at *a* criminal trial."[54] (Emphasis added.) The Pennsylvania court apparently overlooked this language.

The Supreme Court of Oregon, in reversing a rape conviction, found that since there was no evidence that the accused had been informed of his right to remain silent, the prosecution had failed to prove an essential element of its case.[55]

The current controversy centers over the Supreme Court of California's proper interpretation of *Escobedo*. New York, which for many years had blazed a trail in this most important constitutional area[56] has abdicated its courageous leadership.[57] In a single paragraph, New York's highest court would seem to have declined to extend its own rule that the refusal to permit an accused to see his lawyer during his interrogation vitiates his confession,[58] rejected *Dorado*, and ignored *Escobedo*. Certainly, the Court of Appeals would not want to limit the constitutional right to counsel to defendants who, or whose families, have the funds, foresight, and opportunity to retain counsel prior to or immediately upon arrest. This concept runs counter to society's effort to accord the indigent the same rights and privileges as the affluent.[59]

The narrow and overly restrictive interpretations of *Escobedo* can only serve to hamper and delude those in charge of the administration of criminal justice. The discernible trend of Supreme Court decisions

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[54] Escobedo v. Illinois, 378 U.S. 478, 491 (1964).

[55] State v. Neely, 395 P.2d 557, 561 (Ore. 1964). The same rule applies to the right of counsel. See also People v. Lilliock, 62 Cal. 2d 618, 43 Cal. Rptr. 699, 401 P.2d 4 (1965), where the court reasoned that since the admission of an extra-judicial confession required a showing that the accused had been advised of his constitutional right to counsel and to remain silent or had intelligently waived these rights, "it must follow that the burden of showing that such advice had been given by the authorities or that the defendant otherwise waived these rights should fall on the prosecution." *Id.* at 621-22, 43 Cal. Rptr. at 702, 401 P.2d at 6.

[56] People v. Failla, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961); People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960). The United States Supreme Court recognized the leadership of the New York Court of Appeals in this field when it cited with approval a series of cases in Massiah v. United States, 377 U.S. 201, 205 (1964). In addition, the rationale of these cases was adopted in Escobedo v. Illinois, 378 U.S. 478, 486 (1964). See Rothblatt and Rothblatt, *supra* note 2, at 60.

[57] See People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). (However, the court affirmed a reversal of the conviction on other grounds.)

[58] People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

[59] Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). ROTHBLATT, HANDBOOK OF EVIDENCE FOR CRIMINAL TRIALS 139 (1965).

must ultimately lead to a caveat requiring that all suspects be apprised of their right to counsel and to remain silent. The police must obtain their evidence and establish their case against the offender independently of any confession. The best policy is for all law enforcement agencies to inform the suspect of his constitutional rights.

Crime, as well as its prevention and investigation, is a major problem facing our society. It is axiomatic that the solution does not lie in a narrow and ultra-formalistic reading of cases interpreting the Constitution. Rather, the answer lies in the development of novel, dynamic, skillful and more imaginative methods of criminal investigation.